

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:	
PARENT ON BEHALF OF STUDENT,	OAH CASE NO. 2010100554
v.	
SEQUOIA UNION HIGH SCHOOL DISTRICT,	
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SEQUOIA UNION HIGH SCHOOL DISTRICT,	OAH CASE NO. 2010071307
v.	
PARENT ON BEHALF OF STUDENT.	ORDER GRANTING REQUEST FOR OBSERVATION; REQUEST FOR CONTINUANCE; AND SETTING PREHEARING CONFERENCE AND DUE PROCESS HEARING

On January 26, 2011, David H. Tollner, attorney for Student, filed a motion to allow observation of the Sequoia Union High School District's (District) Small Learning Community (SLC) classroom by Student's expert prior to testifying at the due process hearing and a motion to continue the currently pending hearing in this matter. On January 26, 2011, Eugene Whitlock, attorney for District, filed an opposition to Student's motions. On January 27, 2011, Student filed a reply to District's opposition.

APPLICABLE LAW

A student has the right to have his or her expert observe a school district's proposed placement prior to testifying in a due process hearing. (Ed. Code, § 56329, subds. (b) and (c); *Benjamin G. v. Special Education Hearing Office* (2005) 131 Cal. App. 4th 875 (*Benjamin G.*); *L.M. v. Capistrano Unified Sch. Dist.* (9th Cir. 2008) 538 F.3d 1261.) Further, a student's observation right is not conditioned on reciprocity.

Education Code section 56329, subdivisions (b) and (c), are essentially identical in their relevant parts and provide as to assessments at public or private expense that, "if [the

public education agency's] assessment procedures make it permissible to have in-class observation of a pupil, an equivalent opportunity shall apply to an independent educational assessment of the pupil in the pupil's current educational placement and setting, and observation of an educational placement and setting, if any, proposed by the public education agency, regardless of whether the independent educational assessment is initiated before or after the filing of a due process hearing proceeding."

The court in *Benjamin G.* examined the legislative history of Education Code section 56329, subdivision (b) and held that the statute mandated an opportunity for student's hired expert to observe the school district's proposed placement prior to testifying at a due process hearing and regardless of whether the observation is technically a part of an independent educational evaluation. (*Benjamin G.*, *supra*, 131 Cal.App.4th at pp. 883-884.) Education Code, section 56329, subdivision (c) was drafted in accord with subdivision (b), so whether the observation is approached as one related to public funding or private funding, the outcome is the same.

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted. (34 C.F.R. § 300.515(a); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3).) Speedy resolution of the due process hearing is mandated by law and continuance of the hearing may be granted only upon a showing of good cause. (Ed. Code, § 56505, subd. (f)(3).) In ruling upon a motion for continuance, the Office of Administrative Hearings (OAH) is guided by the provisions found within the Administrative Procedure Act and the California Rules of Court that concern motions to continue. (Cal. Code Regs., tit. 1, § 1020; Cal. Rules of Court, rule 3.1332.) Generally, continuances of matters are disfavored. (Cal. Rules of Court, rule 3.1332(c).)

DISCUSSION

Request for Observation

Student contends that his expert should be allowed to observe the SLC classroom because it was part of an offered placement on May 15, 2009. Student made a request of District to allow the observation, but on December 21, 2010, District denied Student's request. District contends that Student does not have a right to the observation because the SLC placement was not part of an offer pursuant to and following an assessment of Student. Furthermore, District asserts that the SLC classroom is not at issue in District's case and permitting the observation would constitute allowing discovery.

District's position is not supported by the facts or applicable law. This is a consolidated action and while the May 15, 2009 individualized education program (IEP) offer may not be at issue in District's case, it is clearly an issue in Student's case. Student has alleged a denial of a free appropriate public education based upon the offer made in the May 15, 2009 IEP, and the document clearly states, "We decided that [Student] will

participate in the SLC program.” Accordingly the appropriateness of the SLC classroom is at issue in this matter.

Benjamin G. is not restricted to situations where a proposed placement is the result of an assessment conducted by a school district. There, the parents had accepted the school district’s assessment and the propriety of that assessment was not relevant to the dispute, which focused solely upon whether the proposed placement was appropriate. (*Benjamin G., supra*, 131 Cal.App.4th at pp. 884.) As the court noted, to prevent the expert from observing an offered placement that was the subject of the dispute, would have resulted in a “partially prepared expert.” Accordingly, Student is entitled to have his expert observe District’s proposed SLC classroom.

Request to Continue

Student requests that this matter be continued from the currently set due process hearing dates of February 22 through 24, 2011, to a week in March 2011, on the grounds that Parents and two witnesses are on vacation during the week of February 22, 2011. Cancellation of the individuals’ vacations would result in financial hardship. District objects to the continuance and proposes that Student pay to have depositions taken of the two witnesses. District further asserts that its counsel is unavailable during the week of February 28, 2011, due to a previously calendared jury trial. District fails to state when the jury trial in the conflicting matter was set.¹

District has failed to establish how a short continuance would be prejudicial to District. OAH has reviewed the request for good cause and the request is granted. **No further continuances will be granted without a substantial showing of good cause. Unavailability of counsel due to conflicts on counsels’ calendars will no longer be considered good cause for a continuance in this matter.**

ORDER

1. Student’s request to have his expert observe the SLC classroom is granted.
2. Student’s request to continue this matter is granted. The prehearing conference date of February 7, and the due process hearing dates of February 22 through 24, 2011, are vacated.
3. The prehearing conference in this matter shall take place on February 23, 2011, at 1:30 P.M.

¹ It is of interest that in a prior motion to continue, District opposed Student’s request for a continuance during the week of February 28, 2011, if this matter were not to finish by February 24, 2011. It now seeks a continuance for the very same week of February 28, 2011, because its counsel may not be available.

4. The due process hearing in this matter shall take place on March 8 through 10, and 15 through 17, 2011.

Dated: February 1, 2011

/s/

BOB VARMA
Administrative Law Judge
Office of Administrative Hearings